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No. 99-970

IN THE

Supreme Court of the United States

WILLIAM RUSSELL AIKEN, *et al.*,

Petitioners,

v.

CITY OF MEMPHIS, TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONSE TO QUESTIONS PRESENTED

Petitioner's "Questions Presented" do not properly state the issues. They may be correctly stated thus:

1) Where an agreement negotiated between a City and its police officers through their designated bargaining representative governs procedures for officers' use of compensatory time off within a reasonable period after their request for same, pursuant to which officers' requests for particular days are granted or denied based on the minimum staffing needs of the relevant precinct or bureau on the days in question, does such a practice violate the Fair Labor Standards Act of 1938 (FLSA) and pertinent regulations of the Department of Labor (DOL)?

2) Under relevant decisions of this Court and DOL regulations, does the FLSA require a City to provide its police officers overtime pay for all waking hours while at home on paid sick leave solely because the City requires officers on sick leave to notify their supervisor before leaving home, where permission to do so has never been denied, and where officers on sick leave are not subject to being called in to work?

PARTIES TO THE PROCEEDING

In addition to the individual parties listed by Petitioners, the City of Memphis, a political subdivision of the State of Tennessee, is a party.

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STATEMENT OF THE CASE[1]

A. Statement of Facts

Respondent submits the following additional facts from the record:

The City has long recognized the Memphis Police Association (MPA) as the designated bargaining representative for Memphis police officers below the rank of lieutenant for purposes of entering into agreements with the City concerning wages, hours and conditions of employment. Apx. at 657, 1378.[2] At all pertinent times the City and the MPA were parties to a series of negotiated Memoranda of Understanding (Memoranda) governing these areas. *Id.* The Memoranda contain grievance and arbitration procedures for resolving disputes thereunder. *Id.*

Compensatory Time

The Memoranda contain specific provisions governing officers' use of compensatory time off ("comp time"). Under the Memoranda, officers who work overtime (OT) may choose between receiving OT pay (1-1/2 times their regular pay rate) or comp time (1-1/2 hours for each hour of OT worked). Apx. at 1377-1378, 1381.

An officer who wishes to use accrued comp time must tell a supervisor. Each precinct or bureau maintains a log

1. Record references are to the Appendix filed with the Sixth Circuit Court of Appeals.

2. The MPA did not join in this lawsuit, nor did 3/4 of the City police officers.

book in which officers may sign up to use comp time. As a general rule, officers may request comp time any time within 30 days of the requested day off by asking their supervisors to write their names in the log book for that day. The officer's request to use comp time, up to and including same-day requests, will be granted if the log book does not indicate "Full" or "No more," under the circumstances explained below. Apx. at 1381-1382, 1396.

Officers' comp time requests are regularly granted. Apx. at 1381. The commanding officer/supervisor ("CO") of each precinct or bureau monitors that unit's log book to ensure that each shift is adequately staffed. The number of officers allowed to take time off at any one time in each unit is determined by the current circumstances of that particular unit. If the CO determines that any further requests for time off for any one shift may adversely affect the functioning of the unit, the CO may indicate that no further time off (including comp time) may be granted for that shift by drawing a line under the last name and entering "Full" or "No more" on the log book. Apx. at 1397. As a general policy, officers are not called in on an OT basis in order to permit another officer to use comp time, though reserve officers may be called in for this purpose. *Id.* As a result of this policy, on occasion officers' requests for use of comp time have been denied. Apx. at 1381.

The OT policy is applied flexibly so as to meet the needs of individual officers as well as unit needs. For example, on occasion, even after the CO has cut off comp time use for a given shift, additional time off has been requested and allowed. Conversely, it has occasionally become necessary to cancel comp time previously given when officers' illnesses or injuries caused staffing to dip below required levels.

Officers seeking to use comp time after the maximum number of requests have been granted have the option of securing a suitable replacement from the ranks of reserve officers. Apx. at 1123, 1397.

No individual officer has ever filed a grievance concerning the denial of comp time use, nor has the MPA.

"Location When Ill" (LWI) Policy

The City provides paid sick leave whereby officers receive their normal hourly compensation while being excused from work due to a reported illness or on-the-job injury that prevents them from performing their job duties. Apx. at 656, 659-660. For employees on sick leave the City maintains a "Location When Ill" (LWI) policy. *Id.* As its name implies, the LWI policy requires employees to notify the Department of their location while on sick leave. Originally published by the Memphis Police Department as DR 1104, it provides in relevant part:

> A member reporting sick or injured shall be confined to his or her residence, clinic, or hospital, except to visit his or her personal physician or by permission of his or her supervisor.[3]

Apx. at 659. One reason for the policy is to dissuade employees from the inappropriate practice of using "sick" days as additional vacation days. Apx. at 647, 708-711, 784.

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3. In recent years DR 1104 was clarified to require an employee on sick leave to remain at home only during the eight-hour block of time that would normally constitute his or her work day. (Apx. at 660).

Under this policy, an employee on sick leave may leave home to see a physician, or may leave home for other reasons with the supervisor's permission. Apx. at 656. By its own terms, DR 1104 places no restrictions on an employee's activities while at home on sick leave, the only requirements relating to notice and permission. Apx. at 646-647, 656, 659, 782. Under the policy, employees on sick leave are not required to remain fit for duty, nor are they subject to being called in to work while on leave. *Id.* Apx. at 706, 719-710. Several Plaintiffs have admittedly engaged in a wide range of personal activities while on sick leave, including activities outside the home, while others acknowledged that while on sick leave they did not feel physically capable of doing many everyday activities. Apx. at 647, 706, 718-725, 727-730, 782.

Over the years there have been only a few isolated instances of officers being disciplined for violation of the LWI policy. Apx. at 713-716. One officer was disciplined for using sick leave to work a second job without permission. Apx. at 807-808. No officer has been terminated for an alleged violation of the policy since January 1990. Apx. at 648.

As indicated, the Memoranda of Understanding between the City and the MPA contain grievance procedures for addressing these kinds of issues. No Plaintiff has ever filed a grievance with respect to the application of the LWI policy or to challenge discipline issued thereunder. Apx. at 648, 657, 785. Pursuant to its Charter and ordinances, the City operates under civil service provisions which cover severe disciplinary measures, such as termination, demotion, or suspension without pay for more than 10 days. There was no evidence that any officer has ever challenged the application of the LWI policy through the civil service process. Apx. at 648, 708-711, 785.

B. Proceedings Below

On the comp time issue, pursuant to Fed. R. Civ. P. 52(a) the district court issued detailed findings of fact and conclusions of law (Apx. at 1388) and a judgment for the City (Apx. at 1409), based on the terms of the Memoranda which the parties had negotiated. The court found that the arrangement, based on minimum staffing needs of each unit at any given time, complied with the FLSA requirement that an employee be permitted to use accrued time within a reasonable period after making a request if such would not unduly disrupt agency operations. The court also noted that DOL regulations acknowledge that through an agreement or understanding the parties can determine what is a reasonable period, which they did in this case.

On the LWI policy, the district court granted summary judgment to the City, rejecting Plaintiffs' claim that they were entitled to OT pay for all their waking hours while home on sick leave. Apx. at 1005. Such did not constitute "hours worked" under the FLSA. The court determined after a careful examination of the record that DR 1104, as written and applied, was not so onerous as to effectively prevent Plaintiffs from using their leave time for personal pursuits. Apx. at 1014. Upon reviewing and analyzing additional affidavits which the Plaintiffs submitted, the district court reaffirmed its earlier findings in a subsequent ruling. Apx. at 1058-1062.

In a carefully reasoned opinion, the Sixth Circuit Court of Appeals affirmed the district court on these rulings.

REASONS FOR DENYING THE WRIT

There are no "compelling reasons" to justify the granting of a writ of certiorari. S. Ct. Rule 10. Applying the illustrative reasons contained in Rule 10, petitioners make no claim that the Sixth Circuit's decision conflicts with that of any another United States court of appeals or with that of any state court of last resort. Nor do petitioners allege that the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Rather, petitioners assert that the Sixth Circuit (1) decided an important question of federal law that has not been, but should be, settled by this Court; and (2) decided an important federal question in a way that conflicts with relevant decisions of this Court. Careful scrutiny belies both assertions.

Indeed, the asserted errors in this case focus on factual nuances and the application of particular facts to properly stated existing law, a situation in which a petition "is rarely granted." S. Ct. Rule 10. Further, the fact-specific nature of this case, unlikely of repetition, does not lend itself to precedent-setting results.

I. THE LOWER COURTS' DECISION REGARDING COMPENSATORY TIME DOES NOT INVOLVE AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT, AND *CHRISTENSEN v. HARRIS* IS INAPPOSITE.

As petitioners note, in *Christiansen v. Harris*, 120 S. Ct. 320 (Oct. 12, 1999) this Court has agreed to consider whether the FLSA permits a public agency to require its employees to use accrued compensatory time, rather than

giving the employees the option of receiving overtime pay, "absent a pre-existing agreement." Pet. for Writ of Cert. at 19. This case presents precisely the opposite question: Where an agreement between the employer and union-represented employees does exist, and the agreement gives employees the option of choosing between overtime pay and compensatory time, does the FLSA permit a public agency to apply its compensatory time rules?

These are absolutely critical distinctions, as both lower courts in this case stressed as a dispositive point the application of bargained-for agreements (Memoranda of Understanding) governing compensatory time.

The district court decided this issue following a full exploration of the documented facts at trial, and issued detailed and specific findings of fact relating to it. The Court of Appeals examined the same record and reached the same conclusion. The lower courts' determinations arose out of the particularized fact setting of this case, including specific provisions of the parties' negotiated agreement and specific circumstances relating to the needs of Memphis police units to be adequately staffed for the protection of the public. These are not circumstances likely to recur at any other time and place. As such, they do not lend themselves to Supreme Court review.

Moreover, the lower courts' fact-specific analysis follows closely the very DOL regulations upon which Petitioners rely. The regulation on the "reasonable period" determination looks to "the customary work practices within the agency based on the facts and circumstances in each case." 29 C.F.R. § 553.25(c)(1). Similarly, the DOL's regulation defining the term "unduly disrupt" refers to

anticipated situations that "would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public" during the employee's absence. 29 C.F.R. § 553.25(d).

Even accepting *arguendo* the point of view articulated by the dissenter in the Court of Appeals, which Petitioners now stress, what we have here is a "difficult, mixed question of fact and law." *Aiken v. City of Memphis*, 190 F.3d 753, 764 (6th Cir. 1999) (Ryan, J., dissenting). Again, such questions do not merit review by this Court, especially where, as here, the results affect only the immediate parties.

II. THE LOWER COURTS' DECISION REGARDING THE CITY'S "LOCATION WHEN ILL" POLICY DOES NOT CONFLICT WITH THIS COURT'S DECISIONS, BUT IS COMPLETELY CONSISTENT WITH THEM.

The district court decided this issue on summary judgment, based on undisputed facts and well-established principles of law as articulated by this Court.

Petitioners base their argument on incorrect factual premises. They assert that the City's LWI policy confines officers on sick leave to their home 24 hours a day. As both lower courts noted, the LWI policy imposes no such requirement, and as shown, Petitioners' own testimony revealed that they can and do engage in personal pursuits while on sick leave. Petitioners correctly note that they are not on call, a distinction which explains why the FLSA does not require that they be paid overtime (in addition to their regular sick leave pay) as if they were at work.

Far from deciding a federal question in a way that conflicts with relevant decisions of this Court, the lower courts' approach to the LWI policy reaffirms the Court's central point that in enacting the FLSA, Congress ensured that each covered employee receives "a fair day's pay for a fair day's work." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981), quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942). In addressing overtime pay requirements, the Act itself requires overtime pay for "hours worked" beyond a certain number of hours per pay period. 29 U.S.C. § 207(a). The City's LWI policy does not convert time spent at home on sick leave into "hours worked."

Petitioners cite two inapposite cases, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) and *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), as decisions by this Court with which the courts' decisions in this case conflict. Petitioners declare that these cases, and a related DOL regulation, establish that "time spent at home *on call may* be compensable *under certain circumstances*." Pet. for Writ of Cert. at 23 (emphasis added). As *Skidmore* and *Armour* show, firefighters on stand-by alert and ready for duty, or employees who must remain on or near the employer's premises for special duty, may qualify. Employees home on sick leave, engaging in personal pursuits and not subject to being called to work, plainly do not. Moreover, as this Court observed in *Armour*, such determinations are "dependent upon all the circumstances of the case." *Armour*, 323 U.S. at 133. Once again, these fact-specific situations are not appropriate for this Court's review.

CONCLUSION

For the foregoing reasons the petition should be denied.

Respectfully submitted,

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